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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No._____

REX STIDHAM WINDOM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
FIFTH CIRCUIT COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI
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FIFTH CIRCUIT COURT OF APPEALS

The petitioner, REX STIDHAM WINDOM, prays that a writ of certiorari issue to review the final order and opinion of the Fifth Circuit Court of Appeals rendered in these proceedings.

OPINION BELOW

The final order and the majority and dissenting opinions of the Fifth Circuit Court of Appeals are reported at 510 F.2d. 989 (No. 74-2935, April 7, 1975) and attached hereto as Appendix A, p. 16. An order of the Fifth Circuit Court of Appeals denying petitioner's petition for rehearing was entered on June 2, 1975, and is attached hereto as Appendix B, p. 30. Mandate was stayed to July 2, 1975, and is attached hereto as Appendix C, p. 31.

JURISDICTION

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. 1254(1), and Rule 19, ¶1(b), of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Was petitioner incorrectly given a multiple sentence for one criminal act as a matter of judicial convenience?

2. Was petitioner denied a fair trial because the accomplice's uncorroborated testimony instruction failed to follow constitutional guidelines resulting in plain error?

3. Was petitioner denied a fair trial because the opinion resorted to uncharged crimes to justify instructions on aiding and abetting?

4. Was petitioner denied a fair trial and unduly prejudiced before the jury by the totality of the mistakes made in the jury instructions?

STATUTORY PROVISIONS

Title 18, *United States Code*:

"§ 495. *Contracts, deeds, and powers of attorney*

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer

of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both. . . . "

Title 18, *United States Code*:

"§ 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Title 18, *United States Code*:

"§ 2314. *Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting*

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered,

or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

"This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country."

Title 18, *United States Code, Federal Rules of Criminal Procedure*:

"Rule 52. Harmless Error and Plain Error

(*a*) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(*b*) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

On February 15, 1973, petitioner was indicted in the United States District Court, Eastern District of Louisiana, for Uttering Forged Documents and Interstate Transportation of Funds Obtained by Fraud. The nine-count indictment charged violations of 18 U.S.C. §495, 18 U.S.C. §2314, and 18 U.S.C. §2.

These charges stemmed from allegations that the petitioner and Raymond Starns, the government's key witness against petitioner, on the 16th day of February, 1972, uttered and published United States Treasury checks totaling eight in number within the jurisdiction of the Court. These are the first eight counts in the indictment, count nine being severed on October 11, 1973 by United States District Judge Fred J. Cassibry, who heard the case during the trial which lasted for two days, June 3 and 4, 1974.

At the trial the witnesses against the petitioner consisted of (1) Raymond Starns, a co-indictee who had been convicted and was a resident of the Federal Penitentiary at the time of the trial; (2) James Maxwell, the president of the bank where the instruments were uttered; (3) three government agents, one who was a handwriting expert; and (4) George Boyd, the person whose name had been forged.

The handwriting expert testified that the petitioner "could have" forged the documents in question. There was vigorous objection by the counsel for the defense because there had been a prior written stipulation that the handwriting of the petitioner could not be identified as that appearing on the checks. The prosecution devoted a considerable portion of the closing argument to this testimony of the handwriting expert even though, as the opinion below correctly points out, the petitioner was not on trial for forgery.

The jury was also instructed under 18 U.S.C. §2314, charging possession of forged documents although this charge had been severed. The court devoted over fifteen percent of the jury instructions to charges that were not applicable to the trial. The elements of forgery were also included in the instructions although once again the petitioner was not on trial nor

ever charged with this. Objection was made to all of this. The closing argument was infected with remarks that the petitioner was a "con artist," had changed his hair color and general appearance although there was no evidence supportive of this or any evidence presented to call the defendant a "con artist."

Both Starns and Maxwell were granted immunity to testify against petitioner. Starns was to receive a lesser sentence, and he admited that he changed his story after he was sentenced to prison. He had not identified the petitioner until after he was promised a lesser sentence. This occurred after prior interviews with the government agents when Starns was unable to tell the agents anything. Maxwell received a "general" immunity from prosecution for anything that went on in the bank and there was testimony that he had been using the bank to transfer large sums of stolen securities in interstate commerce.

Without the uncorroborated evidence of both of these accomplices there would be no case against the petitioner. The only testimony against the petitioner is that he handed an envelope to the banker Maxwell. Maxwell endorsed the checks, under suspicious circumstances. Petitioner was found guilty and sentenced for committing eight offenses, although he only performed one act, that of handing the envelope to the banker.

The proof testified to by the accomplices made out the petitioner to be the principal, yet he was charged before the jury with aiding and abetting. Petitioner's counsel objected to this to no avail.

The Fifth Circuit Court of Appeals found nothing wrong with the above mentioned proceedings. It used the hidden innuendo of a statement made on the stand by Starns involving other unspecified and uncharged crimes to justify the aiding and abetting charge. The court termed the concededly unnecessary instructions on possession of stolen securities a "sham issue" and stated that the petitioner was handed a windfall as this placed a burden on the government. The court allowed the

prosecutor to defame the petitioner by stating the evidence supported calling him a "con artist" and prosecutors could give "their personal evaluations of what a low-down fellow the defendant really is." The court also refused to prevent the government from introducing evidence contra to a valid written stipulation entered into by the defense and government counsels that the handwriting was not that of the petitioner. The court below found this issue to be "incomprehensible" as petitioner was not charged with forgery.

It is the petitioner's plea that the whole trial was incomprehensible to the jurors and the totality of the errors requires a reversal. For brevity, only three main points are argued in depth. The other errors are set out in one heading and not gone into in detail.

Point One: Was petitioner incorrectly given a multiple sentence for one criminal act as a matter of judicial convenience?

The opinion below finds that: ". . . Each check was a separate document, requiring a separate endorsement, and thus was uttered individually. Besides, the appellant received concurrent sentences." *United States v Windom,* 510 F. 2d at 995. The facts proved by the government show that the defendant did not endorse the checks. The checks were endorsed by the bank president Maxwell. Petitioner simply handed an envelope to the banker. This is corroborated by both of the accomplices. The opinion is therefore erroneous when it implies that the defendant endorsed the checks in question. There is a multitude of cases interpreting what constitutes a single transaction for the purposes of deciding the validity of multiple sentences.

The evidence required was the same for the conviction on each count, at least this is what the government introduced. They were simply referred to as "checks," or "an envelope containing checks." Never were they referred to by serial number or were they used as eight different pieces of evidence as

charged in the indictment. The transaction in question occurred at one instance, on one date, at one bank, and in one place — Denham Springs, Louisiana. This by any standard of measurement is only one transaction.

When the statutory intent is not perfectly clear in stating an intent to permit multiple punishments for a single transaction, the ". . . doubt will be resolved against turning a single transaction into multiple offenses." *Bell v United States,* 349 U.S. 81, 84, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955), (two women in same vehicle during trip is only one violation of the Mann Act); *Castle v United States*, 368 U.S. 13, 82 S.Ct. 123, 7 L.Ed.2d 75 (1961), facts found at 287 F.2d. 657, 662 (C.A. 5, 1961), (transportation of five forged money orders in interstate commerce only one offense); *Hefflin v United States,* 358 U.S. 415, 419-420, 79 S.Ct. 451, 453-454, 3 L.Ed.2d. 407 (1959), (defendant cannot be charged with receiving and taking the same property); and *Ladner v United States*, 358 U.S. 169, 177-178, 79 S.Ct. 209, 213-214, 3 L.Ed. 2d. 199 (1958), (single discharge of a shotgun only one violation, although two officers were wounded). The court must resolve any ambiguity in favor of lenity if there is a choice; " . . . before we choose the harsher alternative, . . . " we must require, " . . . that Congress should have spoken in language that is clear and definite." *United States v Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952), (a course of conduct is prohibited, so it is not a violation as to each individual employee).

The two judges in the majority reason the approach to this problem is holding that the sentences are concurrent, but " . . . the concurrent sentence doctrine is rapidly waning." *United States v Alexander*, 471 F.2d. 923, 933, ft. nt. #17 (1973), (separate convictions improper where one defendant, by a single act, put group in fear); citing *Benton v Maryland*, 395 U.S. 784, 791-792, 89 S.Ct. 2056, 2061, 23 L.Ed. 2d. 707 (1969), (concurrent sentence doctrine only a rule of judicial convenience

if it survives at all); see also *United States v Hooper*, 432 F.2d. 604, 605-606 (1970), (concurrent sentences vacated in the overall interest of justice where there is neither injustice done defendant nor a need of the government overridden. The Fifth Circuit, the circuit which subscribes to the doctrine the most, doesn't wholly subscribe to this unjust doctrine; see, *United States v Tyler*, 505 F.2d. 1329, 1333 (C.A. 5, 1975).

If the opinion below is accepted, then it overrules a case directly on point from the same circuit, *United States v Driscoll,* 454 F.2d 792, 801 (C.A. 5, 1962), where the defendant passed six checks on three separate instances and the court correctly ruled that this sentence was erroneous and would be prejudicial to the defendant by reducing his opportunities for earlier parole or pardon.

If the decision below is accepted, it will also mean that the circuits are divided on this subject. This court can decide this issue once and for all and take a step towards judicial economy by eliminating multiple sentences and/or fruitless appeals on this subject. The Ninth Circuit held in *Gilinsky v United States,* 368 F.2d 487, 489 (C.A. 9, 1966), that two forged checks were passed on the same date and both immediately forwarded together in interstate commerce and three checks were also passed on the same date but were forwarded a day later together. Only two offenses of passing false securities in interstate commerce occurred, not four as the sentence stated. The Seventh Circuit recently in *United States v Calhoun*, 510 F.2d. 861, 869 (C.A. 7, 1975), held " . . . that absent a showing that two firearms were stored or acquired at different times or places there is only one offense, not two." The District of Columbia Circuit in *United States v Canty*, 469 F.2d. 114, 126-127 (C.A. D.C., 1972), refused to apply separate counts for robbing each teller in a bank saying, " . . . There is no doubt here that only one transaction took place. . . . " The Tenth Circuit in *Robinson v United States*, 143 F.2d. 276, 277, 278 (C.A. 10, 1944), preceded *Bell v United States*, supra, in

holding the Mann Act forbid only one crime when more than one woman was transported in one car. The case contains an excellent analogy of the problem:

> " . . . We think an analogy may be drawn with larceny at common law. Larceny is the felonious taking by trespass and the carrying away of the personal property of another without the latter's consent, and with the felonious intent permanently to deprive the owner of such property. If a person drove a vehicle to the barn of another and unlawfully and feloniously loaded into the vehicle 25 sacks of corn, which had been stored in the barn by the owner, and carried it away with the intent permanently to deprive the owner of the possession thereof, such person would be guilty of a single larceny, although he loaded each sack into the vehicle separately and had an unlawful intent as to each sack of corn. It would constitute a single offense, even though the corn taken belonged to different owners, because there would be one single act of taking and carrying away."

The Eighth Circuit has held in *United States v Leach*, 429 F.2d 956, 960 (C.A. 8, 1970), that assaults on two officers by multiple defendants are not one act of hindrance by each defendant, but are two offenses. The Third Circuit in *United States v Jacek*, 298 F.2d. 429 (C.A. 3, 1962), found that receiving ten money orders was one act and only one count, but forging ten money orders is ten counts.

The concurring opinion would vacate the multiple sentences and remand for sentencing on one count. Judge Rosenn points to the lack of similarity in the Fifth Circuit on this "harmless" sentencing when the sentences are concurrent and points out, as many others have done, "that multiple sentencing is "prejudicial." 510 F.2d. at 996.

Point Two: Was petitioner denied a fair trial because the accomplices' uncorroborated testimony instruction

failed to follow constitutional guidelines resulting in plain error?

The only witnesses against the petitioner were his two accomplices, with the exception of the government handwriting experts and the real George Boyd. Therefore, the conviction of this petitioner exists solely because of the testimony of two accomplices who were given immunity to testify against him. Because the federal courts permit conviction on the uncorroborated testimony of accomplices, the cautionary instruction as to an accomplice witness' motivation for testifying is of the utmost importance. The qualifying instruction was even more necessary because Starns was already convicted of this crime and was to get a lesser sentence if he testified. Starns and Maxwell were involved in other similar crimes involving this same bank. Maxwell was given immunity, Starns a lesser sentence, and Starns admitted that he changed his story after he had been convicted. Maxwell himself endorsed the checks.

The testimony of an accomplice is "inevitably suspect" and unreliable, *Bruton v United States,* 391 U.S. 123, 136, 88 S.Ct. 1620, 1628, 20 L.Ed.2d. 476 (1968). The failure to give the crucial cautionary instructions regarding the accomplices' motives in testifying is plain error. *United States v Leonard*, 494 F.2d. 955, 961-962 (C.A. D.C., 1974), (refusal to instruct that testimony of accomplices who have been granted immunity should be considered with caution was reversible error); *United States v Gonzalez*, 488 F.2d. 833, 835-836 (C.A. 2, 1973), (confusing charges on accomplices' testimony combined with improper summation by prosecutor required reversal). The *Gonzalez* opinion is directly in point as the prosecutor indulged in unwarranted inflammatory remarks in his closing argument and many other errors occurred at the trial which are summarized for the sake of brevity in Point Four of this petition.

Point Three: Was petitioner denied a fair trial because

the opinion resorted to uncharged crimes to justify instructions on aiding and abetting?

The opinion dismissing petitioner's argument that the trial court erred in instructing the jury on aiding and abetting is not supported by any authority. Instead the opinion resorts to the testimony of the accomplice Starns, about another and different crime Starns committed — a crime as to which there was neither a charge, nor any evidence, to show that the petitioner was a participant therein. Thus, this important point is ruled against petitioner without any factual or legal basis. The opinion states at 510 F.2d. 994:

> " . . . This testimony (about the uncharged crime) *could have given rise* to an inference, *if* the jury saw fit to accept it, that *if* Windom was not acting on his own behalf when he deposited the checks he was aiding and abetting Starns . . . "

Starns testified that petitioner had nothing to do with this other, different criminal conduct of Starns. Starns' testimony shows all the "could haves" and "ifs" indulged in by this court could not have been indulged in by the jury.

The government's theory in this case is that the petitioner was the principal. Cross-examination of the government's key accomplice witness shows that the petitioner was using Starns as an accomplice for petitioner to pass checks to the banker. Later the testimony is that the petitioner gave Starns $5,000. There is no evidence of the petitioner aiding and abetting the accomplice, if we are to believe the accomplice, as to who committed what acts. Now the petitioner is asked to digest the contra of the testimony when he complains that he was not an aider and abettor. The government can't have it both ways.

The law is unequivocal that to convict the defendant of aiding and abetting, and to so instruct the jury, the government's case must establish beyond a reasonable doubt the commission of an offense by someone else and aiding and abetting by the defendant who is so charged.

> " . . . Of course, a defendant may be tried and convicted as a principal upon proof that he aided and abetted the commission of a crime, but in the instant case the proof does not support a conviction on the accessory theory. As was said in Morgan v United States, 10 Cir., 159 F2d 85, 87: 'One cannot aid and abet in the commission of a crime unless there is another who has committed the offense. In other words, one cannot be an aider and abettor of himself in the commission of an offense. Obviously, therefore, one cannot be found guilty under a charge of aiding and abetting in the commission of an offense unless there is satisfactory evidence not only of his participation but also that another for whom he was acting was connected with the offense.' " (Cases cited.)

United States v Horton, 180 F. 2d. 427, 431 (C.A. 7, 1950), (aiding and abetting instruction erroneous when failure of proof of conviction of co-defendent as principal); see also *Edwards v United States*, 286 F.2d. 681, 683 (C.A. 5, 1960), (conviction of co-defendant as a principal not established); and *United States v Barfield,* 447 F.2d. 85, 89 (C.A. 5, 1971), (government must prove that defendant charged as an aider-abettor assisted in the commission of the crime).

Equivocal instructions, which render it impossible to tell on what ground the jury acted, are error. *Yates v United States*, 354 U.S. 298, 311, 77 S.Ct. 1064, 1073 (1957). Equivocal instructions on basic issues are error, ***Bollenbach v United States,*** 326 U.S. 607, 613-614, 66 S.Ct. 402, 405-406 (1946).

Point Four: Was petitioner denied a fair trial and unduly prejudiced before the jury by the totality of the mistakes made in the jury instructions?

The acknowledged error in the several instructions cannot

be considered in a vacuum. The error in aiding and abetting instruction is compounded with the error in the instructions on forgery, another crime not charged against the petitioner. These two instructions take on added importance when considered with the instruction on the inference to be drawn from possession of recently stolen checks (another crime not charged against petitioner).

The whole effect of these cumulated instructions sounds and points too much toward the petitioner's criminality, for him to have received a fair trial, unaffected by the prejudicial effect of these cumulative instructions. The instructions are full of references to uncharged and unproved crimes. These careless instructions must have prejudiced the petitioner in the minds of the jurors. The jurors could only have concluded that the petitioner had committed all the crimes mentioned and must, therefore, be guilty of the crime actually charged.

The aura of prejudice against the petitioner in this trial is further manifested by the allowance of "expert" testimony that the petitioner "could have" forged the checks (contrary to the formal stipulation of counsel); permitting the prosecutor to refer to the petitioner — then unconvicted — as a "con artist"; the refusal to give the proper and required cautionary instruction about accomplice testimony; the submission to the jury of eight charged counts against the petitioner, when only one offense was involved; and the imposition of multiple sentences on the eight counts.

The government was allowed by the trial and appellate courts to present every imaginable image of criminality on the part of the petitioner. It presented evidence and innuendo of crimes not charged and law not applicable. The petitioner is told that this is proper as it placed a burden on the prosecution that was unnecessary. The petitioner claims that this is grossly prejudicial to him before a jury and feels that the totality of these matters cannot be placed in the category of "mere harmless errors."

CONCLUSION

The opinion of the Court is contrary to law, is in contravention of the United States Constitution, represents an injustice to petitioner, and establishes dangerous precedent, contrary to the decisions of this and other circuits. Therefore, for the foregoing reasons, the petition for writ of certiorari should be granted and petitioner should be restored to his rights under the Constitution of the United States.

Respectfully submitted:

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APPENDIX A

UNITED STATES v. WINDOM

UNITED STATES of America,
Plaintiff-Appellee,

v.

Rex Stidham WINDOM,
Defendant-Appellant.

No. 74-2935.

**UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT**

April 7, 1975.

Defendant was convicted in United States District Court for the Eastern District of Louisiana at New Orleans, Fred J. Cassibry, J., of publishing and uttering as true eight government checks bearing forged endorsements, knowing the endorsements to have been forged, and he appealed. The Court of Appeals, Coleman, Circuit Judge, held that any error in admitting testimony of government's handwriting expert that defendant "could have" signed the checks, after government and defendant had stipulated that on basis of the analysis and comparison it was not determined that handwriting on the checks was the handwriting of defendant, was harmless in view of eyewitness testimony that defendant caused the endorsements to be typed on the checks, in view of no contradiction of the basic premise of the stipulation, and in consideration that defense counsel knew that the expert was going to be called to testify; that instruction that government would have to prove beyond a reasonable doubt that defendant had obtained possession of a genuine obligation of the United States required government to carry a burden which was not properly assignable to it and was not prejudicial to defendant; that evidence supported instruction on aiding and abetting; that failure to

give accomplice instruction was not plain error where the direct evidence included testimony of two witnesses who were not accomplices; and as each check uttered was a separate document, defendant was properly convicted on eight counts.

Affirmed.

Rosenn, Circuit Judge, filed concurring opinion.

1. Stipulations — 14(10)

Any error in admitting testimony of government's handwriting expert that defendant "could have" signed government checks which bore forged endorsements, after defendant and government had stipulated that on basis of analysis and comparison it was not determined that handwriting on the checks was the handwriting of defendant, was harmless in view of eyewitness testimony that defendant caused the endorsements to be typed on the checks, in view of no contradiction of the basic premise of the stipulation, and in consideration that defense counsel knew that the expert was going to be called to testify. 18 U.S. C.A. §495.

2. Criminal Law — 1172.7

Instruction, in prosecution for uttering as true eight government checks bearing forged endorsements, knowing the endorsements to have been forged, that government was required to prove by evidence beyond reasonable doubt that defendant had obtained possession of a genuine obligation of the United States required government to carry a burden which was not properly assignable to it, and defendant was not prejudiced by the instruction. 18 U.S.C.A. §495; Fed.Rules Crim.Proc. rule 52, 18 U.S.C.A.

3. Criminal Law — 792(2)

Evidence in prosecution for punishing and uttering as true eight government checks bearing forged endorsements, knowing the endorsements to have been forged, supported instruction on aiding and abetting. 18 U.S.C.A. §§2, 495.

4. Criminal Law — 1038.2

Failure to give accomplice instruction where the testimony of the accomplice is the only direct evidence aga. st the accused is plain error.

5. Criminal Law — 1038.2

Failure to give accomplice instruction in prosecution for publishing and uttering as true eight government checks bearing forged endorsements, knowing the endorsements to have been forged, was not plain error where the direct evidence was supplied by three witnesses, two of whom were not accomplices. 18 U.S.C.A. §495.

6. Criminal Law — 814(1)

Instruction on what constitutes forgery, in prosecution for publishing and uttering as true eight government checks bearing forged endorsements, knowing the endorsements to have been forged, was merely explanatory of the actual charge, uttering the forgery, and in giving the instruction the trial court did not submit an additional charge not contained in the indictment. 18 U.S.C.A. §495.

7. Criminal Law — 722(2)

Prosecuting attorneys are not permitted to indulge themselves, or their audiences, in unrestrained, abusive histrionics, giving their personal evaluations of what a low-down fellow the defendant really is.

8. Criminal Law — 1171.6

Unflattering characterizations of a defendant will not provoke a reversal when such descriptions are supported by the evidence.

9. Criminal Law — 722(2)

Trial court did not commit reversible error in declining to declare a mistrial after the prosecutor in the course of argument referred to the defendant as a "con artist."

10. Criminal Law — 1177
Indictment and Information — 130

Inasmuch as each of the eight checks, involved in prosecution for publishing and uttering government checks bearing forged endorsements, knowing the endorsements to have been forged, was a separate document, requiring a separate endorsement, defendant was properly prosecuted and convicted on eight counts and, in any event, defendant received concurrent sentences. 18 U.S.C.A. §495.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, COLEMAN and ROSENN*, Circuit Judges.

COLEMAN, Circuit Judge.

Rex Windom appeals his conviction of publishing and uttering as true eight government checks bearing forged endorsements knowing the endorsements to have been forged.[1] We affirm.

The direct evidence against Windom was supplied by three

*Of the Third Circuit, sitting by designation.

1. The first count of the indictment reads:

Count 1

That on or about the 16th day of February, 1972, at Denham Springs, Louisiana, in the Eastern District of Louisiana, Rex Stidham Windom and Raymond Starns having obtained possession of a genuine obligation of the United States, to wit, a United States Treasurer's Check No. 6287421, dated February 1, 1972, and payable to Tri-State Motor Transit Company in the amount of $10,394.42, did then and there utter and publish as true and genuine a false and forged writing, that is the falsely forged endorsement of Tri-State Motor Transit Company on the back of said check, with intent to defraud the United States, well and truly knowing the said writing to be false and forged; all in violation of Title 18, United States Code, Section 495 and Section 2.

There were seven additional counts, identical to the first, except for the check number.

witnesses — Raymond Starns, James Maxwell, and George Boyd.

Starns' Testimony

At the time of the trial, Raymond Starns was serving a sentence in federal penitentiary arising out of some of the same criminal activities with which defendant was charged. Starns testified that in February of 1972 he was attempting to sell his bankrupt business, the Mechanical Maintenance and Manufacturing Company. On February 16, 1972, a business associate introduced him to the defendant. Windom represented himself to be George Boyd, President of the prosperous Missouri corporation, Tri State Motor Transit. He told Starns that he was planning to invest in a Louisiana business and might be interested in buying the Mechanical Maintenance and Manufacturing Company.

During the discussion of the proposed sale, defendant told Starns that he wanted to open an account in a Louisiana bank. Starns recommended the First National Bank of Denham Springs, where he did his banking business, and agreed to take Windom to that bank.

When they got to the bank, Starns and Windom talked with James Maxwell, the bank president. Defendant again represented himself to be George Boyd, and explained his desire to open an account. To open the account, he produced eight U. S. Government checks, made out to Tri State Motor Transit, the Missouri corporation he claimed to represent. Since defendant said he did not have the company's stamp with him, Maxwell

* * * * * *

18 U.S.C. § 495, Par. 2, is the statute under which defendant was indicted. It reads:

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited;

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

had Tri State's endorsement typed on the checks. The representation that the endorsements were true and authorized is the criminal act for which Windom stands convicted.

Starns testified that he and defendant had two other meetings for the purpose of discussing the proposed Mechanical Maintenance sale. One occasion was a brief meeting at a Baton Rouge coffee shop. The other took place at the offices of Starns' attorney. The law office meeting was the occasion on which Windom first drew on the account he had fraudulently established in the Denham Springs Bank. He drew a $35,000 check, who gave it to Starns, who, in turn, gave it to a secretary for cashing. The secretary returned with the cash; defendant put it in his briefcase.

The meeting ended with no finalization of the sale of the business. Starns drove defendant to the airport. On the way, for reasons left unclear by Starns' testimony, defendant gave Starns $5000 in cash, plus some checks which Starns later discovered to have been stolen.

Contact between Starns and defendant terminated with their arrests.

Maxwell's Testimony

James Maxwell, President of the Denham Springs First National Bank, corroborated Starns' testimony to the effect that defendant had come to the bank, had represented himself to be George Boyd, and had deposited the government checks made out to Tri State Motor Transit. He testified that he had cashed a $35,000 check signed "George Boyd," delivered by the secretary. He further testified that Starns had given him a $110,000 check signed "George Boyd." The $110,000 check was payable to another bank and was drawn for a transfer of funds. He honored this fraudulent check, but the money was recovered.

George Boyd's Testimony

The real George Boyd testified that he is president of Tri

State Motor Transit, that he does all his banking in Missouri, that he has never been in Denham Springs, Louisiana, and that he does not know how the defendant obtained the government checks made payable to his company.

The Appellate Arguments

Defendant makes no claim that the above recited evidence is insufficient to sustain the conviction. Instead, he urges various alleged evidentiary, procedural, and instructural errors:

> 1. Did the Judge err in admitting evidence supplementing facts stated in a written stipulation?

The government took a handwriting specimen from defendant. It had an F.B.I. handwriting expert compare this handwriting with the signatures on checks and other documents signed by the person calling himself "George Boyd." The government hoped to show that the individual who had signed the checks as "George Boyd" was the defendant.

The handwriting expert could reach no definite conclusion as to whether or not the signatures on the checks were made by defendant. Consequently, the government and the defendant entered the following stipulation:

> "(O)n the basis of the analysis and comparison, it was not determined that the handwriting on the exhibits was the handwriting of Rex Windom."

Some time prior to the trial, the government advised Windom's counsel that it planned to call its handwriting expert to testify. The government attorney specifically invited defense counsel to question the expert so that he would be prepared to cross examine. The invitation was declined.

At the trial, over objection, the handwriting expert testified in detail about the procedures used in signature analysis. He further testified that although he had formed no conclusion, the defendant possibly "could have" signed the checks.

Defendant says the admission of the expert's testimony was reversible error since "a written stipulation may not be commented on, nor testimony taken, once the parties have agreed to the stipulation."

How this factor was allowed to creep into the case seems incomprehensible. Windom was not on trial for uttering handwritten endorsements. The charge was that he had falsely represented himself to be the president of the company to whom the checks were issued and had falsely represented that he had authority to cause typewritten endorsements to be affixed to the checks. That he did cause the endorsements to be typed on the checks was proved by the eye witness testimony of both Starns and the bank president. If it can be said that the forgery of the real Boyd's signature on checks drawn on the account would tend to show that Boyd was guilty of the original forgery, the answer is that the forgery had already been proven by direct, rather than secondary evidence, as had the delivery of the $30,000 check to the attorney.

On the other hand, we are equally skeptical that the episode in any way prejudiced Windom. The testimony of the witness did not contradict the stipulation. Indeed, it confirmed it. It nailed down the proposition that the handwriting expert could not conclude that Windom did the handwriting in question. This should have been to Windom's advantage. True the witness was allowed to say that Windom could have done it, but that was not what the case was about. The issue was, did he utter forged typewritten endorsements? Furthermore, defense council had been on adequate notice that the handwriting expert would be called to testify.

(1) In view of the eye witness testimony, in view of no contradiction of the basic premise of the stipulation, in consideration of the fact that the expert witness admitted that he could not say that the writings were Windom's, and in further consideration that defense counsel knew all along that the expert was going to be called to testify, our appraisal of this skirmish

is that if error existed it was harmless beyond a reasonable doubt.

(2) We are similarly unimpressed by appellant's complaints concerning the instructions of the Court which conceded, although unnecessarily, that the government would have to prove by the evidence beyond a reasonable doubt that Windom had "obtained possession of a genuine obligation of the United States." The indictment charged this, but this was pure surplusage. The offense was uttering a forgery, not possessing a stolen government check. The end result of all this is that the government assumed and, by the instructions of the Court, was required to carry a burden which was not properly assignable to it. Instead of being prejudiced, Rule 52, Fed.R.Crim.P., the defendant was handed a windfall. It was a sham issue in any event. Obviously, the defendant had to come into the possession of the check, else he could not have offered them to the bank president.

(3) The assignment about the instruction on aiding and abetting, 18 U.S.C.A. §2,[2] must be consigned to a similar fate. The appellant argues that this instruction was wholly improper because there was no evidence that Windom aided another to commit the offense charged; in other words, by the government's proof, Windom was himself the principal. Even so, Starns had testified that on one occasion prior to the time he and Windom deposited the government checks in the Denham Springs bank, he, Starns, the close associate of Windom in depositing the checks, had deposited $300,000 in stolen U. S. Treasury notes in the same bank as collateral for a loan he was arranging for some associates. This testimony could have given rise to an inference, if the jury saw fit to accept it, that if

2. 18 U.S.C.A. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Windom was not acting on his own behalf when he deposited the checks he was aiding and abetting Starns in his various activities associated with stolen government checks and securities.

(4) The appellant additionally complains of the failure of the District Court to give the customary accomplice instruction, that such testimony must be received with great caution. The problem with this is that the defense requested no such instruction, so the point is of no moment unless it amounted to plain error. The failur to give such an instruction where the testimony of the accomplice is the only direct evidence against the accused *is* plain error, Tillery v. United States, 5 Cir., 1969, 411 F.2d 644; Williamson v. United States, 5 Cir., 1964; 332 F.2d 123.

(5) To the contrary, in a case where the defendant was convicted on the uncorroborated testimony of *two* convicted accomplices we declined, in the absence of a close evidentiary situation, to reverse for failure to give a cautionary instruction, United States v. Clark, 5 Cir., 1973, 480 F.2d 1249.

(6) We are next met with the assertion that the trial court should not have charged the jury in the following language:

> The writing of a payee's endorsement on a United States Treasury Check by any person other than the payee, if done willfully and without authority, and with intent to defraud, constitutes a forgery within the meaning of Section 495 of Title 18 of the United States Code.

We agree with what the 8th Circuit said in Cummings v. United States, 8 Cir., 1968, 398 F.2d 377, 382: the reference to forgery was merely explanatory of the actual charge, uttering the forgery, and in giving the instruction the trial court did not submit an additional charge not contained in the indictment.

(7-9) Finally, we are told that the District Judge committed reversible error when he declined to declare a mistrial after the prosecutor in the course of argument referred to the defendant as a "con artist." We resist the temptation to present a recapitu-

lation of the many cases dealing with this subject. In general, prosecuting attorneys are no longer permitted to indulge themselves, or their audiences, in unrestrained, abusive histrionics, giving their personal evaluations of what a low-down fellow the defendant really is. Nevertheless, the law remains that unflattering characterizations of a defendant will not provoke a reversal when such descriptions are supported by the evidence. See, e. g., Walker v. Beto, 5 Cir., 1971, 437 F.2d 1018, in which the prosecutor referred to the appellant as a "professional criminal."

(10) Appellant complains that since all eight checks were uttered at the same time to the same recipient he should not have been prosecuted, convicted, and sentenced on eight counts, charging each check as the basis for an individual count. We disagree. Each check was a separate document, requiring a separate endorsement, and thus was uttered individually. Besides, the appellant received concurrent sentences. See United States v. Hale, 5 Cir. 1972, 468 F.2d 435, which deals with both aspects of this argument.

Affirmed.

ROSENN, Circuit Judge (concurring).

Although I concur in the majority's affirmance of defendant's conviction, I would vacate his sentence and remand for sentencing on only one count.

The statute under which defendant was convicted provides in part:

> Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited (shall be fined or imprisoned).

18 U.S.C. §495 (1970). The Government relies upon the word "any" in the statute for its contention that each check uttered constituted a separate offense. I believe this reliance is misplaced. The representation that the check endorsements were true and authorized constituted only a single transaction, and thus only one offense.

In United States v. Driscoll, the defendant was convicted on six counts under a statute making it unlawful to cause the interstate transportation of "any falsely made, forged, altered, or counterfeited securities . . . " 454 F.2d 792 (5th Cir. 1972); 18 U.S.C. §2314 (1970). Although six checks were placed in evidence, the defendant passed these checks on only three separate occasions. 454 F.2d at 801. The court concluded that only three violations of section 2314 occurred and the Government apparently so conceded. *Id.*

The Supreme Court's decision in Bell v. United States, although dealing with a criminal statute in a different substantive area, lends strong support to the position adopted in *Driscoll* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955). The defendant in *Bell* was convicted of two counts under the Mann Act for transporting two women on the same occasion. The Mann Act provides in part:

> Whoever knowingly transports in interstate or foreign commerce . . . any woman or girl . . .

18 U.S.C. §2421 (1970). The Supreme Court held that only one offense had been committed.

> It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulting in expressing it — when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in pro-

> scribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes.

349 U.S. at 83-84, 75 S.Ct. at 622.

I am unable to distinguish the present case from either *Driscoll* or *Bell*. Both section 495 which is involved here and the statutes contain the word "any" in the same syntactical context. As was the statute in *Bell*, section 495 is criminal in nature. Thus, because we are confronted with an expression of congressional intent no more clear than in *Bell*, we should resolve the ambiguity concerning punishment "in favor of lenity" and hold that defendant committed only one offense.

Because defendant could have been convicted of but one offense, the district court erred in sentencing him under each of the eight counts. The majority, however, would treat any such error as harmless since the sentences pronounced by the district court are to run concurrently. I cannot agree that the error in sentencing was harmless.

The so-called concurrent sentence "doctrine," if it ever was recognized, has been eroded substantially in recent years. The Supreme Court decided in Benton v. Maryland, that concurrent sentencing on multiple counts does not preclude, as a matter of jurisdiction, consideration of errors alleged on one count if another count leads to a valid conviction. 395 U.S. 784, 787-91, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

> It may be that in certain circumstances a federal appellate court, as a matter of discretion, might decide (as in *Hirabayashi*) [320 U.S. 81 (1943)] that it is "unnecessary" to consider all the allegations made by a particular party. The concurrent sentence rule may have some continuing validity as a rule of judicial convenience.

Id. at 791, 89 S.Ct. at 2060 (footnote omitted).

In the Fifth Circuit, one line of cases has employed the "discretionary" concurrent sentence rule since *Benton*. United States v. Hendrix, 487 F.2d 893 (5th Cir. 1973) (per curiam); United States v. Lee, 483 F.2d 968 (5th Cir. 1973) (per curiam); United States v. Payne, 467 F.2d 828 (5th Cir. 1972); United States v. Dumenigo, 444 F.2d 253 (5th Cir. 1971) (per curiam); United States v. Varner, 437 F.2d 1195 (5th Cir. 1971) (per curiam). Only *Varner* cites *Benton*. 437 F.2d at 1197. Other cases in the Fifth Circuit, however, have held that concurrent sentencing does not cure conviction on more than the permissible number of counts. United States v. White, 440 F.2d 978, 981 & n. 4 (5th Cir. 1971); Holland v. United States, 384 F.2d 370, 371 (5th Cir. 1967) (*pre-Benton*); see United States v. Mori, 444 F.2d 240, 245 (5th Cir. 1971) (dictum).

I agree with Judge Goldberg writing in *Driscoll*, that multiple sentencing is prejudicial. 454 F.2d at 801.

> (S)everal sentences arising from what should have been a lesser number of offenses, even if the sentences are concurrent, would be prejudicial to the defendant by reducing his opportunities for earlier parole or pardon.

Id. This harm was recognized prior to *Driscoll* in the *White* and *Holland* cases, supra.

I would vacate the sentences imposed by the district court and remand the case for resentencing on one count.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

TO ALL COUNSEL OF RECORD

No. 74-2935 — U.S.A. vs. Rex Stidham Windom

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk.
by Barbara Krei, Deputy Clerk.

cc: Mr. Harry E. Claiborne
Messrs. Gerald J. Gallinghouse
Robert L. Livingston
Mrs. Mary W. Cazalas

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

REX STIDHAM WINDOM,
Defendant-Appellant.

No. 74-2935

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including July 2, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

JAS. P. COLEMAN,
United States Circuit Judge.